No. 22,698

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

MILLER BREWING COMPANY,
Respondent

ON PETITION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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STATUTE:

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JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq,*),[1] for enforcement of its order (R. 20, 3),[2]

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[1]Pertinent statutory provisions are reprinted *infra*, pp. 24-27, as Appendix A.

[2]References to the pleadings, Decision and Order of the Board, the Trial Examiner's Decision and other papers, reproduced as "Volume I, Pleadings," are designated "R." References to portions of the stenographic transcript of

issued on July 20, 1967, against Miller Brewing Company (hereafter "the Company"). The Board's decision and order are reported at 166 NLRB No. 90. This Court has jurisdiction, the unfair labor practices having occurred in Azusa, California, where the Company operates a brewery. No issue of the Board's jurisdiction is presented.

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain about plant rules which it unilaterally issued. The essentially undisputed evidence upon which the Board based its finding is summarized below.

Since 1950, the Union[3] has been the certified collective bargaining representative for certain categories of employees, mainly machinists, of brewing companies belonging to the California State Brewers Institute,[4] which later became the California Brewers Association (the Association) (R. 17; Tr. 10-14). The Association represented six employer-members for the purpose of collective bargaining on a multi-employer basis, and the Union was one of seven

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the hearing, reproduced pursuant to Rules 10 and 17 of this Court as "Volume II, Transcript of Record," are designated "Tr." References to the General Counsel's exhibits are designated "G.C.Exh."; references to the Respondent's exhibits as "R.Exh."; References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[3]International Association of Machinists and Aerospace Workers (AFL-CIO).

[4]See *California State Brewers Institute*, 90 NLRB 1747.

unions that bargained with the Association (*ibid.*). On May 1, 1966,[5] the Company acquired the Azusa, California, plant of the General Brewing Corporation, which was and continued to be a member of the Association (R. 17; Tr. 9-11). Thereafter, the Company also became the seventh member of the Association, and a signatory to the existing labor agreement between the Union and Association (R. 17; Tr. 6, 10, G.C. Exh. 2). The Company continued to employ and the Union continued to represent the 16 machinists who had worked for the Company's predecessor, General Brewing, in the Azusa plant (Tr. 10). From May 1 to October 24, the Company refurbished and remodeled the plant, and on the latter date it began actual operations (Tr. 9, 58).

Shortly before acquisition of the plant, the Company decided to issue certain plant rules governing employee conduct and during May and June a draft was prepared by the Company's Industrial Relations Department in Milwaukee, which was then circulated among the supervisors in the Azusa plant for comment. On September 14 it issued the rules by distributing them in booklet form through the various department heads to the employees. Upon being given the rules, the employees were asked to sign for them; although most did so, the machinists refused. The Union had no prior notice from the Company of the Company's plans or action in this regard (R. 17; Tr. 7, 18-19, 28-30, 53, 58-59, 62-63, 66-67, 84-85, 93).

The rules, which were similar but not identical to the rules maintained by the Company in its Milwaukee, Wisconsin, plant, differed

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[5] Unless otherwise specified, all dates refer to 1966.

in several respects from the plant rules issued by the predecessor company, General Brewing, for the Azusa plant in 1963. Thus, the new rules included prohibitions against theft, removal of Company records, gambling, insubordination, disclosure of confidential information, falsification of records, fighting and horseplay, which were not specifically contained in the 1963 rules, although at least some of these rules were understood by the employees to be in effect. Distinct changes, however, were made in the regulations governing, *inter alia,* overtime, soliciting of funds, gambling and leaving the department without permission. Moreover, the new rules introduced a rigid system of discipline for infractions not found in the old rules, including immediate discharge for violation of the rules termed "major rules" and, successively, warning, layoff and discharge for violation of the rules called "general rules" (R. 18; Tr. 36-50, 54-56, 58-59, 67, 81-86, 88-89, G.C. Exh. 4, R. Exh. 5).[6]

Following issuance of the rules, the Union's business representative, on October 7, telephoned the Company Plant Manager and asked him to discuss and negotiate the rules. The Manager replied that he had been advised by the home office that he was not obliged to do so, and consequently he would not talk about them. On October 10, the Union sent the Company a letter, in which it complained about the Company's "unilateral" promulgation of the rules, and stated that if the rules were not rescinded and the Union thereafter given an opportunity to bargain about them, it would file an unfair labor practice charge. Although the Company received the

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[6]Also prescribed in the same booklet was a series of "safety" rules, violation of which could lead to discipline as well.

letter the next day, it never responded to it (R. 17; Tr. 19-21, 25-26, 63-64, G.C. Exh. 5). The Union filed the instant charges on October 26, 1966 (R. 3).

II. THE BOARD'S CONCLUSIONS AND ORDER

Upon the foregoing facts, the Board found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain about the promulgation and content of the plant rules (R. 19, 30-31).

The Board ordered the Company to cease and desist from the unfair labor practice found and from in any like or similar manner interfering with, restraining or coercing employees in the exercise of their bargaining rights (R. 20, 31). Affirmatively, the order requires the Company to negotiate and discuss the promulgation and content of plant rules with the Union on request, and to post appropriate notices (R. 20-21, 31).

ARGUMENT

THE BOARD PROPERLY CONCLUDED THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION, UPON REQUEST, ABOUT ITS PLANT RULES

A. The Company was obligated to bargain with the Union about plant rules

Section 8(d) of the Act, which defines the employer's duty to bargain imposed by Section 8(a)(5), requires the employer "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." The employer's statutory duty to bargain does not end when an agreement is reached, but is a continuing one, involving "day-to-day adjustments in the contract and other working rules [and] resolution of new problems not covered by existing agreements . . . ." *Conley v. Gibson,* 355 U.S. 41, 46; compare *N.L.R.B. v. Tom Johnson, Inc.*, 378 F.2d 342, 343 (C.A. 9). Bargaining about any subject encompassed within the statutory definition of "wages, hours and other terms and conditions of employment" is mandatory, *N.L.R.B. v. Borg-Warner Corp.*, 356 U.S. 342, 348-349, and consequently an outright refusal to bargain, on request, about such a subject, or unilateral action by an employer with regard to such a matter. is a violation of Section 8(a)(5). *N.L.R.B. v. Katz,* 369 U.S. 736, 742-743. There can be no question, and the Company did not raise any before the Board, that plant rules, regulating the day-to-day behavior of employees at their work and imposing discipline for their violation, plainly involve working conditions and are, therefore, a required subject of bargaining. *Lloyd A. Fry Roofing Co.*

v. N.L.R.B., 216 F.2d 273, 274, 276 (C.A. 9); *N.L.R.B. v. Tower Hosiery Mills*, 180 F.2d 701, 703 (C.A. 4), cert. denied, 340 U.S. 811; *N.L.R.B. v. Gulf Power Company*, 384 F.2d 822, 825 (C.A. 5); *Little Rock Downtowner, Inc.*, 145 NLRB 1286, 1304, enforced in relevant part, 341 F.2d 1020 (C.A. 8). But see *N.L.R.B. v. Hilton Mobile Homes*, 387 F.2d 7, 12 (C.A. 8). Accordingly, the Company's unilateral promulgation of plant rules and its subsequent refusal to discuss those rules with the Union was violative of Section 8(a)(5) unless justified on the bases set forth in the Company's affirmative defenses. We show below that each of its defenses is without merit.

B. The new rules substantially changed conditions of employment and were not a mere codification of existing rules

As shown *supra*, pp. 3-4, the new rules introduced prohibitions not mentioned in the 1963 rules issued by the predecessor company, General Brewing, although some were generally understood by the employees to be in effect. Many of the new rules, however, had not, so far as the evidence shows, previously been in force. Thus, certain forms of gambling such as card-playing and large football pools were restricted, although they had apparently been tolerated in the past (Tr. 33, 39, 86). Collections among employees for worthy causes were limited (Tr. 85). The right enjoyed under General Brewing to refuse to work overtime was taken away, even though the collective bargaining agreement arguably protects such a right (R. 18; Tr. 44, G.C. Exh. 3, p. 5). A new and rigid system of discipline for violations of the rules, the scope of which had not existed under the old system, was imposed (R. 18; Tr. 41-42, 48-49, 54-55). More-

over, General Rule 19 asserted the Company's right to establish "any other rules . . . from time to time" it wished (G.C. Exh. 4).

These facts, we submit, make it clear that the new rules were not, as the Company urges, just a restatement of existing regulations but represented a substantial departure from prevailing practice. The Company conceded as much at the hearing, for its own witness, Manager Lewis, stated in effect that the rules were not patterned after General Brewing's rules, but were taken basically from the plant rules in effect in its Milwaukee plant and drafted by its industrial relations department in Milwaukee (Tr. 58-59, 67). Therefore, as the Board pointed out (R. 30-31), while the mere posting of *existing* rules is not bargainable, *Mason & Hughes, Inc.,* 86 NLRB 848, 850, the promulgation, as here, of *new and different* rules is bargainable as to both substance and merits. See cases *supra,* pp. 6-7.

Furthermore, because of the haphazard way in which General Brewing had issued its rules in the past (Tr. 81-84), and the uncertainty as to the scope of the new rules (Tr. 85-86), bargaining was required to ascertain the precise nature and extent of the employees' present duties and responsibilities under the rules.[7] The Company's statement at the hearing that it was willing to discuss the

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[7]Compare *N.L.R.B. v. Katz, supra,* 369 U.S. at 746-747:

> Whatever might be the case as to so-called "merit raises" which are in fact simply automatic increases to which the employer had already committed himself, the raises here in question were in no sense automatic, but were informed by a large measure of discretion. There simply is no way in such a case for a union to know whether or not there has been a substantial departure from past practice, and therefore the union may properly insist that the company negotiate as to the procedures and criteria for determining such increases.

meaning and application, but not content, of its rules (Tr. 25-26), ignores the fact that it flatly refused to enter into any discussion of any kind with the Union about the rules. In any event, as shown, it was obligated to bargain in both of these respects.

There is no substance to the Company's claim that changes in plant rules, that have not been bargained for, are violative of the Act only when they stem from improper motives. An employer's bargaining obligation, once established, is independent of his obligations under other sections of the Act not to make changes for anti-union reasons, and it exists even though the employer acts in good faith, *N.L.R.B. v. Katz, supra,* 369 U.S. at 742-743, or under a good faith but erroneous view of the law, *N.L.R.B. v. Burnett Construction Company,* 350 F.2d 57, 60 (C.A. 10). Consequently, the Company's subjective motive here in issuing its plant rules is irrelevant, since the facts show a total refusal to bargain about the rules. *N.L.R.B. v. Tom Joyce Floors, Inc.,* 353 F.2d 768, 772 (C.A. 9).

C. The Union properly requested negotiations with the Company rather than the Association

As previously noted, the plant rules in question were prepared by the Company and issued by it through its department heads to its employees. When the Union asked the Company's Plant Manager to bargain about the rules, he refused to do so on the ground that the home office had advised him that he was not obligated to discuss them. At no time did he or any other representative of the Company ever suggest that the Union should deal with the Brewer's Association rather than the Company over the matter of the plant rules.

The facts, we submit, make it clear that, contrary to the Company's argument, the Union properly addressed its bargaining request to the Company, and that its failure to seek bargaining from the multi-employer bargaining association, of which the Company is a member, did not, in the circumstances, justify the Company's refusal to bargain. Bargaining on an individual basis between an employer-member of a multi-employer bargaining association and the union, for the purpose of handling particular conditions prevailing at that employer's facility but not necessarily common to the group, is permissible for it is neither inconsistent with nor destructive of the principle of group bargaining. *Retail Clerks Union, No. 1550 v. N.L.R.B.*, 330 F.2d 210, 213, 216 (C.A.D.C.), cert. denied, 379 U.S. 828; *Genesco, Inc. v. Joint Council 13, United Shoe Wkrs. of Amer.*, 341 F.2d 482, 488-489 (C.A. 2); *Western States Regional Council v. N.L.R.B.*, __ F.2d __, 68 LRRM 2506, 2508-2509, n. 3 (C.A. D.C., No. 21,317, decided June 19, 1968); *The Kroger Co.*, 148 NLRB 569, 573. Accordingly, where a single employer takes action peculiar to it, a request for bargaining made upon that employer is appropriate and creates a bargaining obligation on that employer. *N.L.R.B. v. Spun-Jee Corporation*, 385 F.2d 379, 383 (C.A. 2). Plainly, the request on the Company here was a valid request. The plant rules, which were issued by and through the Company, not the Association,[8] were intended to apply only to the Company's plant, not the plants of the other employer-members of the Association. It was, therefore, entirely proper for the Union to ask the Company to bar-

[8] Past practice was for the other individual employer-members of the Association, including the predecessor-Company, General Brewing, to issue plant rules themselves, applicable only to their own plants (R. 18; Tr. 22-23, 72-73, 78-79, 81-82, R. Exh. 2 and 8).

gain itself about its own act, which had no impact other than in its own plant.

To be sure, an employer is free to designate agents to represent it in bargaining, and it is lawful for an employer to decline to bargain with a union except through its duly designated representative. Nonetheless, as the statute specifies, the ultimate obligation to bargain rests on the employer and, accordingly, a demand on him to bargain, at least initially, is clearly appropriate. If the employer, as principal, then wishes to deal with the Union only through its authorized agent, it is necessary that he make that fact plain to the union. The Company here followed no such procedures. Not only is there no evidence based on past practice or otherwise that the subject of plant rules was a matter to be handled by the Association, but the consistent issuance of plant rules by and through the individual members of the Association, including the respondent Company in the instant case, indicates that it was not. Moreover, the Company at no time before or after the Union's bargaining demand informed the Union that it wanted to deal with it only through the Association about the matter. It is apparent, then, that the Company did not refuse to bargain with the Union over its plant rules because it wanted such discussions to proceed with its agent, and that its present contention to this effect is simply an afterthought.

There is no merit to the Company's further argument that the Union, in attempting to bargain with the Company individually, was effectively seeking fragmentation of the established multi-employer bargaining unit. There is no evidence that the Union's purpose, in asking for bargaining about the plant rules, was other than to bar-

gain with the Company concerning a subject peculiar to it and having no relevance to the Association as a whole or the other employer-members, a legitimate objective as the cases cited *supra,* p. 10, demonstrate. Such bargaining would not have caused any disruption in the overall unit, which would have remained intact as the basic bargaining unit for the handling of all problems common to the group. *The Kroger Co., supra,* 148 NLRB at 573-575.

D. The Union has not waived its right to bargain about the plant rules

1. *The past practice of the parties did not amount to a waiver with respect to the present issuance of plant rules*

As noted *supra,* p. 10, n. 8, in the past other members of the multi-employer association, including the predecessor company, General Brewing, had unilaterally issued plant rules, none of which were protested by the Union (Tr. 23, 73, 78-79, 82). In view of this fact, the Company contends that the Union has waived its right to bargain about its present issuance of plant rules. Plainly, however, a union's inaction in the past with respect to a bargainable subject cannot be regarded as a waiver for all time of its right to bargain about the subject. At most, such silence or acquiesence constitutes only a waiver of its right to bargain as to that specific event, or, where the subject occurs in the course of general contract negotiations, a waiver as to that subject for the term of the contract.[9] Accordingly,

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[9] *Pacific Coast Assn. of Pulp & Paper Manufacturers,* 133 NLRB 690, 691, n. 2, enf'd, 304 F.2d 760, 763-765 (C.A. 9) (waiver of right to bargain at association level on subject of pensions during contract negotiations for 15 years did not preclude assertion of right in new contract negotiations); *General*

the Union's past conduct here is irrelevant, and since the Union promptly asserted its right to bargain about the Company's present issuance of plant rules, there is no basis for finding a waiver of its right to bargain from its actions.

The Board cases cited by the Company,[10] dealing with the question of subcontracting as a bargainable matter, are not in point. It is true that in those cases the Board stated that a previous practice of subcontracting was one element considered by it in dismissing a complaint attacking an employer's failure to give a union a prior opportunity to bargain before letting a particular subcontract. However, as the Board pointed out, for example, in the *Westinghouse-Mansfield Plant* case, the prior practice involved generally consisted of the daily awarding of many subcontracts, totalling in the thousands each year. Such a practice had become, in effect, the usual method of conducting business and was a constant fact of life for the unit employees. 150 NLRB at 1576. By contrast, the issuance

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Telephone Company of Florida v. N.L.R.B., 337 F.2d 452, 454 (C.A. 5) (failure to protest unilateral changes in or abolition of Christmas checks in past was not waiver of right to bargain about present discontinuance of checks); *Leeds & Northrup Co. v. N.L.R.B.*, 391 F.2d 874, 878 (C.A. 3) (prior unilateral changes in a Supplementary Compensation Plan did not relieve employer of duty to bargain where Union protested present changes. "The union, faced with the Company's practice over the years, might well have remained quiescent until such time as it was seriously dissatisfied with the formula.") See also *Armstrong Cork Company v. N.L.R.B.*, 211 F.2d 843, 848 (C.A. 5).

[10] *Westinghouse Electric Corp. (Mansfield Plant)*, 150 NLRB 1574; *Shell Oil Company*, 149 NLRB 283; *Kennecott Copper Corp. (Chino Mines Division)*, 148 NLRB 1653; and see *American Oil Company*, 151 NLRB 421; *Superior Coach Corporation*, 151 NLRB 188; *Westinghouse Electric Corp., Etc.*, 153 NLRB 443.

of plant rules in the instant case has occurred but three or four times in the last twelve or thirteen years among the various members of the multi-employer association. It was not, therefore, an event which the employees had to cope with on a frequent basis.

In any event, the prior practices in the subcontracting cases were only one of several factors relied on by the Board to support its finding that no violation had occurred. The Board also noted such things as the absence of any significant detriment to the unit employees,[11] the presence of contractual provisions empowering the employer to subcontract, and the opportunity to bargain about the decision to subcontract subsequently afforded the union. None of these additional bases is present here. The promulgation of the plant rules produced an obvious detriment for the employees by restraining their actions in important areas where they were formerly free to act. (The fact that the restraint may not be tangibly felt until an employee broke one of the rules is completely immaterial. The rule, which is at all times in effect, itself inhibits activity.) As shown *infra*, pp. 15-17, no provisions in the collective bargaining contract sanctioned the Company's action. Finally, the Company's flat refusal to discuss its plant rules precluded even subsequent bargaining about the rules. The Board's "subcontracting" cases, therefore, are not controlling. The Third Circuit reached the same conclusion in a comparable situation in *Leeds & Northrup Co. v. N.L.R.B., supra*, 391 F.2d at 878-879.

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[11] See *District 50, United Mine Workers, Local 13942 v. N.L.R.B.*, 358 F.2d 234, 237-238 (C.A. 4); but see *International Union, U.A., A. & A. Imp. Wkrs. v. N.L.R.B.*, 381 F.2d 265, 266 (C.A.D.C.), cert. denied, 389 U.S. 857.

2. *The provisions of the collective bargaining agreement do not constitute a contractual waiver*

The collective bargaining contract contained provisions relating to safety and granting the employer the right to discharge employees for "just cause."[12] The Company contends that these clauses gave it the right to issue plant rules unilaterally and, therefore, amounted to a contractual waiver by the Union of its right to bargain about the Company's issuance of plant rules. Plainly, they do not. It is settled law that a purported waiver, in a contract, of the statutory right to bargain, must, to be effective, be in "clear and unmistakable" language—"a mere inference, no matter how strong, should be insufficient." *N.L.R.B. v. Perkins Machine Com-*

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[12] ARTICLE VII. WORKING CONDITIONS

(b) *Safety Rules.* In the interest of maintaining high standards of safety, and to minimize industrial accidents and illness, the following is agreed:

(1) The Employer will comply with all State and Federal safety and sanitary laws. Suitable washrooms and lockers shall be maintained and kept in clean and sanitary conditions.

(2) Adequate safety devices shall be provided by the Employer, and when such devices are furnished, it shall be mandatory for employees to use them.

(3) No employee shall be discharged or disciplined for refusing to work on a job if his refusal is based upon the claim that said job is not safe, or might unduly endanger his health, until it is determined by the Employer that the job is or has been made safe, or will not unduly endanger his health. Any dispute concerning such determination is subject to the grievance procedure.

ARTICLE XII. RIGHTS OF MANAGEMENT

The Union concedes the right of the Employer to discharge any Machinist or Helper for just cause.

Should Machinist or Machinist's Helper be unable to continue his employment due to illness or injury, he shall report to his foreman at the earliest possible moment.

pany, 326 F.2d 488, 489 (C.A. 1).[13] The clauses involved here, we submit, fall far short of meeting this standard.

Thus, the clauses themselves say nothing whatever about the promulgation of rules of any kind, nor do they, by their terms, envision the subsequent issuance of rules interpreting, clarifying or explaining them. To be sure, the Company's "right" to discharge "for just cause," a standard, general provision appearing in most collective bargaining agreements,[14] is not specifically defined in this contract. However, the absence of a detailed catalogue of offenses warranting discharge does not, as the Company urges, automatically give the Company the unfettered right to draw up the list. Certainly,

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[13] Accord: *Fafnir Bearing Company v. N.L.R.B.*, 362 F.2d 716, 722 (C.A. 2); *International Telephone and Telegraph Corp. v. N.L.R.B.*, 382 F.2d 366, 373 (C.A. 3), cert. denied, 389 U.S. 1039; *Leeds & Northrup Company v. N.L.R.B., supra,* 391 F.2d at 878; *N.L.R.B. v. Item Company,* 220 F.2d 956, 958-959 (C.A. 5), cert. denied, 352 U.S. 917; *Timken Roller Bearing Company v. N.L.R.B.*, 325 F.2d 746, 751 (C.A. 6), cert. denied, 376 U.S. 971; *Dura Corporation v. N.L.R.B.*, 380 F.2d 970, 972-973 (C.A. 6); *International Woodworkers of Amer., Local 3-10 v. N.L.R.B.*, 380 F.2d 628, 629-630 (C.A.D.C.); *International Union, U.A., A. & A. Imp. Wkrs. v. N.L.R.B., supra,* 381 F.2d at 267. See also *C & C Plywood Corporation,* 148 NLRB 414, 416, in which the Board, in construing a contractual provision, applied the "clear and unmistakable" test. The Supreme Court, in later upholding the Board, said, "We cannot disapprove of the Board's approach." *N.L.R.B. v. C & C Plywood Corp.*, 385 U.S. 421, 430. It is, of course, well established that the Board has the power to construe contractual clauses in cases of this kind. *N.L.R.B. v. C & C Plywood, supra.*

[14] As of September 1965, "Grounds for discharge are stated in 90 percent of contracts. A general statement to the effect that discharge can be made for "cause" or "just cause" appears in 73 percent of the total. But many of these contracts, plus others which omit general statements (51 percent all told), go on to list one or more specific grounds for discharge." BNA, Collective Bargaining, Negotiations and Contracts, 40:1.

the clause does not expressly grant the Company any such rights. Rather, the phrase, "just cause," would clearly comprehend only what had traditionally been agreed to be a ground for discharge in the plant in the past, as found in the express terms of the contract, the prior written plant rules, or the practice of the parties. Without more, it cannot be authority for the unilateral imposition of new and different standards of conduct, not previously known in the plant. In any event, the most that could be said for the phrase is that it might "arguably" grant the employer such power to act. A phrase of this nature, however, does not satisfy the "clear and unmistakable" test. It cannot, therefore, qualify as a waiver of the statutory right to bargain about the subject of plant rules.

Similarly, the "Safety Rules" provisions merely require the employer and the employees to observe certain listed safety practices and employ safety devices. Nothing is said about any alleged right of the Company to define other safety rules. Moreover, the safety rules are concerned solely with questions of safety, and are, accordingly, irrelevant to the issue of the Company's authority with respect to plant rules, the principal subject of inquiry herein.[15]

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[15]To the extent that some arbitrators' decisions (See Dunau, Contracts and Unfair Labor Practices, 57 Colum. L. Rev. 52, 79) may have sanctioned the unilateral issuance of plant rules in any case other than one in which such act was expressly permitted by the applicable contract, we submit that such decisions are irrelevant in that they fail to give full recognition to the Union's statutory right to bargain or to accept the principle that only a "clear and unmistakable" waiver of the right will be given effect. As previously noted *supra*, p. 16, n. 13, this is the approach approved by the Supreme Court for handling such problems.

E. The Board Properly Exercised Its Power To Adjudicate the Unfair Labor Practice Herein Despite the Availability of Contractual Grievance and Arbitration Procedures

The collective bargaining agreement contained a four-step grievance procedure for the resolution of grievances involving, *inter alia,* the "meaning and application of the provisions of this agreement," culminating in "final and binding arbitration" (Article VI, G.C. Exh. 3). It is settled, however, as the Company apparently concedes, that under Section 10(a) of the Act[16] the Board is not obliged to refrain from exercising its jurisdiction by the existence of alternative arbitration procedures.[17] Nonetheless, the Company argues that, under the facts presented here, the Board should have exercised its discre-

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[16] "This power [to prevent unfair labor practices] shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise. . . ."

[17] *N.L.R.B. v. Acme Industrial Co.,* 385 U.S. 432, 436-437; *N.L.R.B. v. Walt Disney Productions,* 146 F.2d 44, 48 (C.A. 9), cert. denied, 324 U.S. 877; *N.L.R.B. v. M & M Oldsmobile, Inc.,* 377 F.2d 712, 715-716 (C.A. 2); *N.L.R.B. v. Scam Instrument Corp.,* __ F.2d __, 68 LRRM 2280, 2282 (C.A. 7); *N.L.R.B. v. Huttig Sash & Door Co.,* 377 F.2d 964, 970 (C.A. 8); *American Fire Apparatus Company v. N.L.R.B.,* 380 F.2d 1005, 1007 (C.A. 8). Compare *N.L.R.B. v. Tom Johnson, Inc., supra,* 378 F.2d at 343 (C.A. 9).

tion to decline to assert its jurisdiction, and remitted the Union to whatever remedies might be available to it under the grievance-arbitration provisions of the contract. We show below that the Board here did not abuse its discretion by assuming its undoubted jurisdiction.

In general, the Board will decline to make a finding of an unfair labor practice violation and defer to arbitration where the parties have already obtained an arbitrator's decision, or are in the process of obtaining such a decision, the existence of the unfair labor practice turns primarily on an interpretation of a specific contract provision, and it is "reasonably probable that arbitration settlement of the contract dispute would also put at rest the unfair labor practice controversy in a manner sufficient to effectuate the policies of the Act."[18] The Board also considers such factors as whether sending the parties to arbitration will result in duplication and delay.[19]

Plainly, the instant case was not one warranting deferral to arbitration. In the first place, the controversy has never been submitted to an arbitrator.[20] Further, the issues here do not turn solely

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[18] *Cloverleaf Division of Adams Dairy Co.*, 147 NLRB 1410, 1415-1416. See also, *C & S Industries, Inc.*, 158 NLRB 454, 459-460; *International Harvester Co.*, 138 NLRB 923, 927, affirmed *sub nom., Ramsey v. N.L.R.B.*, 327 F.2d 784, 787-788 (C.A. 7), cert. denied, 377 U.S. 1003; *Spielberg Manufacturing Company*, 112 NLRB 1080, 1082; *Dubo Manufacturing Corporation,* 142 NLRB 431, 432, 148 NLRB 1114, 1116, enf'd, 353 F.2d 157 (C.A. 6); *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 270-272.

[19] *Unit Drop Forge Div.*, 171 NLRB No. 73, 68 LRRM 1129, 1131-1132.

[20] *N.L.R.B. v. Huttig Sash & Door Co., supra,* 377 F.2d at 970.

or even primarily on an interpretation of a contract provision, for the Company defends its action on several grounds other than its contract. Moreover, the issue of contract interpretation is not a substantial one, peculiarly within the competence of an arbitrator; rather, it is one wholly suitable for Board determination since it involves, *inter alia,* application of the principle that waiver of the statutory right to bargain can only be shown by "clear and unmistakable" contract language.[21] And if an arbitrator were to render a contrary decision, the Board could not give hospitable acceptance to it because it would necessarily be one opposed to the settled principles of law involved here, and thus repugnant to the purposes and policies of the Act. Finally, to require the parties at this stage of the litigation, a year and a half or more after the onset of the dispute, to present the case to yet another forum for resolution, would im-

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[21] *Compare Smith Cabinet Manufacturing Company, Inc.,* 147 NLRB 1506, 1508; *Century Papers, Inc.,* 155 NLRB 358, 361-362; *C & S Industries, Inc., supra; Gravenslund Operating Co., d/b/a Washington Hardware,* 168 NLRB No. 72, 66 LRRM 1323, 1324, with *The Crescent Bed Company, Inc.,* 157 NLRB 296, 299.

pose needless duplication and delay without gaining any corresponding advantages.[22]

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[22]Following issuance of the Board's Decision and Order herein, the Company moved to reopen the record for the reception of additional evidence, asserting that in the most recent (1967) contract negotiations between the Union and the Association, the Union did not ask either the Company or the Association to bargain about the plant rules (R. 32-46). The Company argued that the Board's order should be withdrawn on the ground that even if it had failed to tell the Union at the time of the original demand that it should bargain with the Association rather than it about the plant rules, it had in effect done so by taking that position in the course of the instant litigation, and the Union's subsequent failure to request the Association to bargain over the matter therefore constituted a waiver of its right to bargain about it now or in the future (R. 33-36). The Board denied the motion as "lacking in merit" (R. 49).

The Board's ruling was manifestly correct. In the first place, the issue with respect to the proper party for bargaining was but one of many contentions made by the Company to support its total refusal to bargain. There is no reason to believe that the Company has abandoned any of its other grounds, and in particular the Company has not stated that, despite its basic position that it is not obligated to bargain about the plant rules, it is now freely willing to bargain on the subject, either by itself or through the Association. Accordingly, the Union had no reason to assume that a later request on the Association would be any less futile than its former one on the Company. In any event, at best, the legal position adopted by the Company in this litigation can be construed as nothing more than a declaration that it is now ready to comply with the law and bargain with the Union about its plant rules, albeit through the Association. However, a claim by a respondent that it has ceased and desisted from committing the particular unfair labor practice with which it is charged, is neither an adequate remedy for the unfair labor practice, nor a barrier to enforcement of the Board's order based on that unfair labor practice. *N.L.R.B. v. Mexia Textile Mills, Inc.*, 339 U.S. 563, 567-570; *N.L.R.B. v. American National Insurance Co.*, 343 U.S. 395, 399, n. 4; *Local 1976, Carpenters v. N.L.R.B.*, 357 U.S. 93, 97, n. 2; *N.L.R.B. v. United Brotherhood of Carpenters & Joiners*, 321 F.2d 126, 129 (C.A. 9), cert. denied, 375 U.S. 953; *Pacific Coast Assn. of Pulp and Paper Mfrs. v. N.L.R.B.*, 304 F.2d 760, 765 (C.A. 9); *N.L.R.B. v. Trimfit of California*, 211 F.2d 206, 209 (C.A. 9). The

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.[23]

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June 1968

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question of whether and to what extent circumstances prevailing now or in the future may affect the Company's bargaining obligations is a problem which should be left to the compliance stages of this proceeding. *Solo Cup Company v. N.L.R.B.*, 332 F.2d 447, 449 (C.A. 4).

[23] Before the Board the Company attacked the portion of the Board's order requiring the Company to cease and desist from "in any like or similar manner interfering with, restraining or coercing employees in the exercise of their bargaining rights" (R. 20). Such a provision is clearly proper. *Lloyd A. Fry Roofing Co. v. N.L.R.B.*, 220 F.2d 432, 433 (C.A. 9).

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18, 19 and 39 of this Court and in his opinion the tendered brief conforms to all requirements.

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Assistant General Counsel
National Labor Relations Board

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

UNFAIR LABOR PRACTICES

Sec. 8(a) It shall be an unfair labor practice for an employer–

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * *

Sec. 8(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification–

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

* * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

* * *

Sec. 10(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district

court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States

upon writ of certiorari or certification as provided in section 1254 of title 28.

APPENDIX B

Index to Reporter's Transcript

(Numbers are to pages of the reporter's transcript)

Board Case No. 31-CA-540

GENERAL COUNSEL'S EXHIBITS

NO.	IDENTIFIED	OFFERED	RECEIVED IN EVIDENCE
1(a)-1(i)	5	5	5
2	5	5	6
3	6	6	6
4	7	7	7
5	20	20	21

RESPONDENT'S EXHIBITS

NO.	IDENTIFIED	OFFERED	RECEIVED IN EVIDENCE
1(a)-1(d)	15	15	16 (rejected)
2	22	23	24
3	30	30	30
4	34	34	34
5	35	83	84
6	60	61	61
7(a) and 7(g)	68	68	69
8	72	74	75
9	75	76	76 (rejected)
10	78	79	79